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## ENTERPRISE LIABILITY FOR INDUSTRIAL INJURIES

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Delegate from Massachusetts to the Annual Meeting of the American Academy, April 7 and 8, 1911.

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The most interesting feature of this meeting of the American Academy of Political and Social Science has been the very general agreement upon the utterly unsatisfactory character of the existing laws for employers' liability. Three ideas in this connection stand out very clearly in the discussion:

First. That the inherent defect of the existing remedies for industrial injuries is that the relief is given as a personal liability founded upon the idea of wrong done by the employer or implied in the negligence of his agents. One of the speakers from the floor called attention especially to this defect as having been recognized by the New York commission, which, nevertheless, started from the same point of personal liability in the act that was declared unconstitutional by the Court of Appeals of New York state. The same point of departure appears also in the New Jersey statute recently enacted. In this plan the statute removes important defenses of the present law, but does so as an inducement for employers to agree to a schedule of compensation, which would supposedly be less burdensome than the amended liability to damages after the restriction of defenses hitherto allowed.

Second. The constitutional difficulty appears, as it met and overthrew the New York statute in the Court of Appeals. It is likely to encounter any statute that is based upon the idea of imposing a personal liability in cases where there is no really wrongful act or omission of the personal defendant or his agent. What the injured workman really wants is neither charity nor mere damages for a supposed wrongful act, but relief in case of injury in his employment whether or not any person in particular is at fault. It is at least open to question whether the New Jersey act, even if constitutional, is a worthy method of handling the problem by enacting a liability, which on the theory of liability between individuals is merely an unjust reversal of present injustice in select-

ing the party to bear the "assumption of risk," etc., and particularly in enacting such liability in order to induce employers to agree to a schedule of compensation, which however wise on the average is arbitrary in a particular case, and further to agree to apply that schedule in cases where it would probably be unconstitutional as an original act, as in New York. The New Jersey statute may work well enough as a rule of thumb for "Jersey justice," but it contains a dangerous precedent.

Third. The insurance features to be considered were strongly emphasized as essential elements of the problem, and in particular the utter disproportion between the amounts paid out by employers on account of the present liability laws, and the amounts which actually find their way into the hands of the needy recipients. The establishment of some sort of insurance fund seems to be the necessary corollary of any scheme for a regular schedule of relief; and the economy of some plan of mutual insurance among groups of interested parties, with careful supervision, and attention to safety devices, was indicated by several speakers.

In order that a state may justly and reasonably compel or induce groups of private parties to enter into schemes of mutual insurance there must be discovered some right to be conserved, other than the mere arbitrary decree of personal liability in the absence of wrongful acts. Also the creation of a fund for the systematic relief of injuries may help us over the constitutional difficulty of taking property upon an arbitrary schedule. It may thus keep us from trying to do a good thing in a bad way, or from doing a bad thing for a good result.

As already declared, the principle of personal liability as for a wrong, seems to offer an utterly insufficient starting point for a satisfactory system of relief. There are, however, other conceptions of rights and remedies known to the law besides the idea of personal liability. They result from situations in which a person has devoted or placed his property in such a relation to another person that such other person may have claims upon that property quite aside from any personal liability. Such a situation is well-known to exist in the maritime law, and is not unknown on shore, as for instance in the cases of liens by legal interpretation or statutory enactment.

Perhaps we can take the general idea of the mechanics' lien

laws as an analogy from which we can construct what we may call the principle of enterprise liability for industrial injuries. In the case of a mechanics' lien, the owner of property consentingly places that property in such a relation to other persons that such persons have a reasonable claim upon such property for the labor or materials put into the enterprise. In the case of an industrial enterprise of production, distribution, or public service, the investors and the workmen put their property and their lives and health in such relation to the enterprise that they build up or maintain a going concern, with a valuable good will, which, as the outcome of joint enterprise must be kept up and maintained by the repair of worn out parts and compensation for injuries inflicted by its operation, or else it is not paying its way.

If this analogy with a mechanics' lien law is correct, then we may, perhaps, exemplify it in a statute establishing a lien upon the assets of such an enterprise, in distinction from a personal liability against the employer, without violating the constitutional prohibition against taking property without due process of law; for the right asserted would exist by virtue of the acts of the interested parties in devoting their lives and their property to a certain purpose, and the right would be limited to such property so devoted as assets of the enterprise. Further, however, such a lien standing alone must be determined for individual cases according to the circumstances of each instance, like damages; but right here comes the opportunity for the application of the principle of insurance, for as the right arises by the acts of the parties in a going concern, so the statute in establishing a remedy by lien may adjust that remedy upon the basis of insurance averages for the risks of the industry, so that persons devoting their services and property to such an enterprise may do so in pursuance of the statute. A supposed law for Massachusetts, according to the foregoing ideas, is appended as an illustrative outline, and not as a final form for enactment.

Draft of an Act for the Relief of Industrial Injuries in Massachusetts:

1. Any person employed for the performance of personal services in an industrial enterprise for the production or distribution of commodities or the rendering of public service for profit, if such person shall suffer bodily injuries in the regular course of business or the execution of his duties in such enterprise, shall have a lien upon the assets devoted to such enterprise; but the title in fee simple to any specific property shall not be affected hereby when a lesser estate only is comprised in the assets of such enterprise.

2. The said lien shall be for the purpose of providing relief or compensation, to the person injured or his dependent relatives for such bodily injuries, and all persons hereafter devoting or continuing to devote their property or services to the uses and purposes of such an enterprise aforesaid shall be taken and held to have devoted their property or services respectively within the purview of this act and in consent to the provisions herein, except and in so far as the performance of any such services may be in pursuance of a contract of employment, already existing at the time this act shall first take effect, and until such existing contract shall be terminated by its own limitations.

3. Such lien shall be enforced, except as otherwise herein provided, by proceedings in accordance with sections twenty-three, twenty-four, twenty-five, twenty-six, and twenty-seven, of chapter 198 of the Revised Laws, except that the proceedings may be instituted forthwith upon the happening of the injury or within a reasonable time thereafter, and the jurisdiction of the court shall be according to the place where the injury shall have occurred. Further proceedings may be had in accordance with sections twelve to twenty-seven inclusive of chapter 197 of the Revised Laws, so far as such sections may be applicable in any case, and may include personal property as well as real estate. The initial proceedings may be begun by petition or by writ as in an action at law, and may be with or without attachment of the whole or any part of the assets liable to the lien, or with the joining of a debtor holding assets as in trustee process; but the title to specific property shall not be affected except as by attachment or levy on execution or a decree of court duly recorded in the appropriate district according to law.

4. Provided, however, that such a lien shall attach to any such enterprise only for the several amounts, rates, or payments, and at the several times respectively, set forth in the "Schedule of Relief" hereto annexed, when and so long as any such enterprise may be or remain enrolled by its owner or its responsible manager under the benefits of a mutual insurance association among the owners of like enterprises in the same general line of business, as hereinafter set forth.

5. The Insurance Commissioner of the Commonwealth shall from time to time classify the enterprises liable under this act in groups or classes of the same general line of business according to similarity of risks, and the owners or the responsible managers of any or all of the enterprises operated according as the chief preponderance of their business generally in the same general line of business may form one and only one mutual insurance association in the same line of business, for the purpose of paying claims under this act against the enterprises duly enrolled under the benefits of such an association. Any enterprise in a particular line of business shall be enrolled at the request of the owner or the responsible manager upon terms approved by the Insurance Commissioner.

6. Such an association shall be a corporation competent to sue or be sued by its corporate name, and may be organized by such owners or managers as in the judgment of the Insurance Commissioner shall establish in any one line of business the most equitable system of rates, premiums, and

assessments, among the members. In the first instance such rates, premiums, and assessments shall be fixed by the association, subject to the approval of the Insurance Commissioner; but the Insurance Commissioner may from time to time order any such association to amend its rates, premiums, or assessments, according to a more equitable basis in reference to the risks in fact involved, and in default of compliance with such order, the Insurance Commissioner may apply to the Supreme Judicial Court in Equity for the dissolution of such association, and the costs and charges of the proceeding.

7. Whenever any lien under this act shall be established against any enterprise enrolled under the benefits of any such mutual insurance association, such association shall reimburse the owner or the responsible manager of such enterprise for the several sums of money at the several times as they become due and for default of sufficient funds shall assess the said sums among the members of the association according to the previously determined system of rates, premiums, and assessments; or such association shall assume the liability to the injured person or his dependent relatives, if he or they as the case may be shall accept such liability of the association and discharge the lien, in which case also the association shall be held to make all necessary assessments as aforesaid.

8. No action at law for negligence shall be maintained in any case of injury for which relief is provided in this act, but a mutual insurance association liable to reimburse the owner or the responsible manager of any enterprise hereunder may recover damages against the person actually at fault, except the assured or the injured person, but against the assured if the injury shall have been caused by the wilful or malicious act of the assured or his neglect of precautionary regulations of such association approved by the Insurance Commissioner.

9. "Schedule of Relief."

(Same as the schedule in the New Jersey act for instance.)